IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Case No. 44184-5-II

CITY OF CAMAS

Respondent

v.

VLADIMIR GRUNTKOVSKIY

Petitioner

RESPONDENT'S BRIEF

Assistant Attorney City of Camas:
David H. Schultz, WSBA 33796
Knapp, O'Dell & MacPherson
430 NE Everett Street
Camas, WA 98607
Phone: (360) 834-4611
Fax: 360-834-2608

pm 7/17/13

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

A. STATEMENT OF FACTS

1. On October 13, 2011, Vladimir Gruntkovskiy, the defendant, drove his blue Mazda Protégé from the Washougal River, while under the influence, to the Subway Restaurant at 602 N.E. 3rd Avenue, Camas, where he was involved in an accident. RP. 99-103, 105, 117, 119, 134, 145-147. Colby Jones, a subway employee, witnessed the accident wherein the vehicle in question cut through the parking lot, drove over the sidewalk, and came to a dead stop when it collided with a utility pole guide wire just outside the Subway. Mr. Jones had a clear view of the vehicle approaching through large windows, saw the collision, stepped outside the building after the collision, and saw the defendant get out of the driver's seat of the vehicle from approximately ten feet away. RP. 97-107, 245-246. Mr. Jones contacted 911 after the three individuals pushed the car free and started to drive away, but he did not see who drove away. Ten to fifteen minutes later, after three suspects were stopped in the Protégé within a few blocks by Camas Police Officers working patrol, Mr. Jones clearly and definitively identified Mr. Gruntkovskiy, the defendant, as the driver of the vehicle. RP. 107-108, 247-248.

2. Sgt. Norcross stopped the suspect vehicle in the "downtown area" a few blocks from where the hit and run occurred. RP. 117-119. Vasilly Romanyuk was the driver of the vehicle when it was stopped by Sgt.

Norcross. At some point during the stop, the defendant stepped out of the car and started urinating by the side of the road next to the car. RP. 126. While he was doing this he demonstrated a lack of balance. RP. 126-128. Later when the defendant got out of the vehicle to participate in a line up, he immediately started taking off his jacket, and sweatshirt. RP. 129-130. He had just been informed that an eye witness had seen the driver of the vehicle, and as the eyewitness was pulling up, the defendant held his sweat shirt in front of his face in an attempt to conceal his identity. RP. 130-131, 148. Shortly thereafter, "[h]e completely disrobed from the waist up and started to take his belt out of his pants" and appeared to be preparing to take his pants off until he was stopped by the officers. RP 130, 148. The defendant was belligerent throughout the contact. RP. 149. Based upon his belligerent behavior, he was placed in the back of a Camas Police Patrol Car. At one point, he "slipped his cuffs" and started banging on the windows of the patrol car. RP. 132.

3. Colby Jones described the driving and odd behavior of the defendant at the time of the accident, and offered that in his opinion they were all drunk. RP. 106. During the cross examination of Mr. Jones, he was asked by defense counsel, "[a]nd you thought at least one of them looked high?" to which Mr. Jones stated, "yeah." RP 111. Officer Hausinger testified he noticed the defendant had an obvious odor of alcoholic intoxicants coming

from his breath, his eyes were bloodshot and watery, his speech was very slurred, and his balance was affected. RP. 147-148. He also testified that the defendant was staggering and had to hold himself up on the car for balance. RP. 147-148. The defendant's own testimony acknowledged he got drunk at the river: "I had too much to drink. I couldn't drive. And he didn't let me drive. He said you sit in the passenger. I drive. You're too drunk." RP. 227-228, 231-232. Mr. Romanyuk testified that the defendant was drunk, could not even stand up, and was staggering. RP. 165. Officer Scott's testified the defendant was slurring his words, smelled of alcohol, and his eyes were watery and bloodshot. RP. 184. When asked about observations indicative of the defendant being affected by alcohol, Officer Scott stated:

> "Right. The assumption was that he was under the influence of something – at least alcohol. I smelled alcohol. But I wasn't sure that was it. But he was staggering and just the irrational behavior – taking all his clothes off in the cold, rainy night – I shouldn't say all of his clothes. The yelling, screaming and cursing. You know – led me to believe he was under the influence. RP 184-185.

4. At the time of the stop, the defendant and Romanyuk initially claimed that they had not been in an accident. RP. 145-146, 161. Also, when Romanyuk was stopped he provided Sgt. Norcross with the defendant's driver's license. RP. 159-160. Minutes later, when contacted by Sgt. Norcoss, but after learning an eye witness existed, Romanyuk claimed that a

fourth person had been the driver but had run away. RP. 163. At trial, Mr. Romanyuk testified that he is the defendant's best friend. RP. 159. He also testified that he was stopped by a Camas Police Officer, in the City of Camas on October 13, 2011, while driving the defendant's vehicle which was just involved in the accident a few blocks away. RP 159-160. At trial, Romanyuk claimed that he was the driver at the time of the accident, not the defendant. RP. 159-161. The defendant did not claim Romanyuk was the driver during the contact on October 13, 2011, to the officers, but did at trial. RP. 145-147, 232.

5. After being placed under arrest and while at the Camas Police Department, the defendant refused to take standard field sobriety tests. RP. 196-197. After being properly advised of his rights and implied consent warnings, Officer Scott prepared the BAC Machine, checked the defendant's mouth for foreign substances, waited for fifteen minutes, asked if the defendant if he would take the test, and the defendant refused to take the breath test. RP 199-203. At the station while Officer Scott was processing Romanyuk for DUI, Romanyuk was cooperative and answered all of the officer's questions, right up to the point he was asked if he had been driving the vehicle. To which Romanyuk smiled and stated, he didn't know. Romanyuk then asked Officer Scott if he had a best friend. Romanyuk

followed this by asking Officer Scott what would you do for your best friend as he gestured towards Mr. Gruntkovskiy's holding cell. RP. 205-207.

6. Officer Scott testified that he observed "skid marks going across the sidewalk and the damage to the utility pole's guide wire." RP. 178. He also testified that "the damage to the vehicle appeared to be approximately the same height as the – the bent utility cable" and the skid marks led to the damage. RP. 192. He also testified that there were fresh scratches and did not see any signs of rust indicating the damage was from this accident. RP. 193.

7. In this case, at no point did the defense contest that the defendant was under the influence of either alcohol or the combined affects of alcohol and a drug. When referring to the element in the City's closing argument, the City argued there is no question that the defendant at the time of driving the motor vehicle was under the influence of or affected by intoxicating liquor or was under the combined influence of or affected by intoxicating liquor and a drug. RP. 257. "Their entire defense is focused on who was driving the vehicle." RP. 258. At no point in the defense's closing argument was there even an attempt to argue that the defendant was not under the influence of or affected by intoxicating liquor or was under the combined influence of or affected by intoxicating liquor and a drug. RP. 258-268. This defense tactic was reasonable based upon the overwhelming evidence suggesting the defendant's ability to drive was clearly lessened by a appreciable degree

beyond a reasonable doubt. The jury considered all the evidence and reasonable inferences that could be drawn, weighed credibility, deliberated, and convicted the defendant for DUI, and found that he refused to take the breathalyzer test.

8. The defendant failed to object to the method of jury selection to the trial court. No record whatsoever was made to the trial court regarding the jury panel, and the method of selecting the jury panel. The Clark County Superior Court Administrator randomly drew the jury panel from the entire county. The Camas Municipal Court used the master jury list developed by the Clark County Superior Court. Camas citizens are included in the master jury list.

9. The defendant raised the issue relating to selection of the jury panel for the first time on appeal. No motion, affidavit, or record existed relating to the selection of the jury or method for selecting the jury panel prior to conviction. No record was developed regarding the process of jury selection, or whether the making of a jury list provided for a fair and impartial jury but for the supplemented record. The City of Camas objected to supplementation of the record, and cited RALJ 6.1(b). See Objection to Motion to Supplement the Record. CP. 464-66.

10. The Clark County Superior Court affirmed the conviction and sentence at issue. The Superior Court held that "RCW 2.36.050 provides for

flexibility in pooling a jury with the purpose of providing a fair and impartial jury. So long as the RCW 2.36.050 is substantially complied with actual prejudice must be shown by the Appellant. By definition, substantial compliance will be found if there is no material departure from the statute." The Superior Court rejected the defendant's challenge to the jury panel, and found that there was no material departure from the requirements of RCW 2.36.050, and no prejudice was shown. Based on its ruling, the court did not decide whether the claim was barred as untimely. See Superior Court's decision on RALJ appeal. CP. 444.

11. The Court of Appeals Division II granted discretionary review in part. Commissioner Bearse noted that "[d]espite the statutes use of the term 'may,' our Supreme Court appears to require "substantial...compliance" with the statute's geographic selection limitation," relying on *State v. Thyman*, 143 Wn.2d 115, 122, 17 P.3d 1184 (2001). Commissioner Bearse also noted that "*State v. Finlayson*, 69 Wn.2d 155, 157, 417 P.2d 624 (1966), supports that a party waives any alleged error in the method of making the jury list when he or she does not raise the issue at trial." See Ruling Granting Motion for Discretionary Review in Part and Denying Motion in Part.

B. ISSUES ACCEPTED FOR REVIEW

1. Whether the lower court improperly submitted the case to a jury which was not selected from just the area served by the Camas Municipal

Court.

2. Whether the defendant waived an appellate challenge to the jury selection method by failing to raise the issue at trial.

C. ARGUMENT IN RESPONSE

1(a). The Jury was Properly Selected and Impaneled.

First, Washington State Constitution article I, § 22, requires that "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The Revised Code of Washington states that: "[i]n courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court." RCW 2.36.050.

"Both statutes and case law establish that the statutory requirements for making up the jury lists are merely directory and need be only substantially complied with." *State v. Twyman*, 143 Wn.2d 115, 124-125, 17 P.3d 1184 (2001); *see State v. Tingdale*, 117 Wash.2d 595, 600, 817 P.2d 850 (1991), *State v. Finlayson*, 69 Wash.2d 155, 157, 417 P.2d 624 (1966), *W.E. Roche Fruit Co. v. N. Pac. Ry.*, 18 Wash.2d 484, 488, 139 P.2d 714 (1943), *State v. Rholeder*, 82 Wash. 618, 620, 144 P. 914 (1914), and RCW 2.36.065.

Pursuant to RCW 2.36.065, "[n]othing in this chapter shall be construed as requiring uniform ... method throughout the state, so long as fair and random selection of the master jury list and jury panels is achieved".

The purpose of article I, §22 of the Washington State Constitution is to guarantee a fair and random selection of jurors from the county in which the crime is alleged to have been committed. RCW 2.36.050 protects the essential element of the jury selection process: it ensures random selection of jurors of the county in which the offense is charged to have been committed, thus consistent with the constitutional mandate of article I, §22. RCW 2.36.050 clearly sets forth legislative intent. In the case at bar, there has been no showing, or record establishing that a fair and impartial jury was not selected. A fair and random selection from the master jury list, and a fair and random jury panel was achieved. As the appellate courts have noted, so long as the element of randomness is safeguarded in the jury panel selection process, it is constitutionally sound. *State v. Tingdale*, 117 Wn.2d at 600.

Pursuant to RCW 2.36.050, "[i]n courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court" (emphasis added). If the statute's language is plain on its face, a

reviewing court should give effect to that language as a statement of the legislative intent. *State v. Hirschfelder*, 170 Wash.2d 536, 543, 242 P.3d 876 (2010).

A statute's plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). When faced with a question about the meaning of a statute, the reviewing court should go no further than the words of the statute when those words are plain and unambiguous. *Christensen v. Ellsworth*, 162 Wash.2d 365, 373, 173 P.3d 228 (2007). The court's primary goal in construing a statute is to determine and give effect to the legislature's intent. *Am. Cont'l Ins. Co. v. Steen*, 151 Wash.2d 512, 518, 91 P.3d 864 (2004)(citing *State v. Watson*, 146 Wash.2d 947, 954, 51 P.3d 66 (2002)).

"[A] statute is ambiguous if it can be reasonably interpreted in more than one way." *Yousoufian v. Office of King County Executive*, 152 Wash.2d 421, 433, 98 P.3d 463 (2004)(quoting *Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd.*, 127 Wash.2d 759, 771, 903 P.2d 953 (1995)). Only when a statute is ambiguous, should a court resort to principles of statutory construction, legislative history, and relevant case law to assist in

interpreting it. *Id.* at 434. Assuming *arguendo* this even needs to be done, the court should also consider the make up of the various counties and cities.

An undefined term should be given its plain and ordinary meaning, unless a contrary legislative intent is indicated. *Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 813, 828 P.2d 549 (1992). Standard dictionaries provide the ordinary meaning of words. *State v. Watson*, 146 Wash.2d at 954. Websters provides multiple definitions for "shall" and "may," but the ones most apposite provide: that "shall" is "used in laws, regulations, or directives to express what is mandatory," and that "may" means "to have the ability to." When the Legislature's uses both "may" and "shall" in the same provision, it demonstrates that the two words were intended to have different meanings, with "may" being directory, and "shall" being mandatory. *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 519, 852 P.2d 288 (1993).

A review of the plain language of RCW 2.36.050 demonstrates the city's substantial compliance with the statute. The City followed the legislative mandate of using the master jury list developed by the superior court to select a random jury panel from Clark County. The "master jury list" is "the list of prospective jurors from which jurors summoned to serve will be randomly selected." RCW 2.36.010(9). The City was not required to select only from the population of the area served by the court. Had the legislature

intended to mandate selection from the more limited population, "the area served by the court," it would have used the word "shall." According to the plain language, the legislature stated that priority is given to a fair and random selection, but that a variety of specific processes may be developed by particular courts. It permits localization, but does not require it. Therefore, the City of Camas complied with the plain language of the statute.

In *City of Tukwila v. Garrett*, 165 Wn.2d 152, 196 P.3d 681 (2008), our supreme court rejected an argument to shrink a jury pool further than RCW 2.36.050 and the case law require. In *Garrett* the Court held:

> "[t]he defendant maintains that pursuant to RCW 2.36.050 jury pools for trials in Tukwila Municipal Court must be composed of persons residing within the city limits of Tukwila. Because the jury pool from which his jury was drawn was not, he contends that the jury pool was selected in violation of the statute. The trial court rejected the defendant's argument, but the superior court agreed and reversed his conviction.
>
> The purpose of article I, section 22 of the Washington State Constitution is to guarantee a fair and random selection of jurors from the county in which a crime is alleged to have been committed. RCW 2.36.050 authorizes a court of limited jurisdiction to select jurors from a more limited pool, 'the population of the area served by the court,' so long as the jurors are randomly selected. Mr. Garrett advocates for a smaller pool of jurors than the City of Tukwila provides, thus decreasing the opportunity for a diverse and random jury. We reject Mr. Garrett's invitation to shrink the jury pool further than RCW 2.36.050 and our cases require. We reverse the superior court." *City of Tukwila v. Garrett*, 165 Wn.2d at 155-156.

In *City of Tukwila v. Garrett*, for the purposes of the appeal, Tukwila accepted Garrett's statement that the Shoreline Division of the King County District Court draws jurors from the master jury list compiled for superior court and eliminates those jurors whose residential addresses are outside the specified three or four zip code areas nearest the Shoreline Court. Similar to our case, the master jury list compiled for Superior Court was used, thereby, complying with article I, §22. However, in *City of Tukwila v. Garrett*, the issue related to whether Tukwila in utilizing the directory language, "[j]urors for the jury panel may be selected at random from the population of the area served by the court," was in substantial compliance with the statute. Tukwila had the statutory authorization to limit the jury panel to the City of Tukwila, however, the manner it which this limitation was done, was the issue in that case. The zip codes included additional residents from the county, outside of the City of Tukwila. According to the Washington Supreme Court, the fact that a particular pool from which Mr. Garrett's particular jury was selected included a majority of jurors from outside Tukwila's boundaries did not invalidate the selections. *Tukwila*, 165 Wn.2d at 156.

In *City of Bothell v. Barnhart*, 172 Wn.2d 223, 257 P.3d 648 (2011), the Washington Supreme Court addressed jury composition where a city encompasses portions of multiple counties. *City of Bothell v. Barnhart*, 172 Wn.2d 226-27. Prior to trial, Barhart objected to impaneling King County

Jurors, because the crime was committed in Snohomish County. The Bothell Municipal Court drew its jury panel from Bothell, regardless of the county where the jurors resided, despite the crime occurring entirely in Snohomish County, over the defendant's objection. *Id.*

The issue in *City of Bottell v. Barnhart* related to the constitutionality of the application of the directory language of RCW 2.36.050. The Washington Supreme Court rejected the interpretation for "county" to mean "community represented by the court." As noted by the court, doing so would "violate the basic constitutional precepts that the constitution means what it says, and when it is not ambiguous there is nothing for the court to construe." *Id.* at 232 (quoting *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988)). In its analysis, the court discussed *State v. Newcomb*, 58 Wash. 414, 109 P. 355 (1910), *State v. Thyman*, 143 Wn.2d 115, 17 P.3d 1184 (2001), *City v. Tukwila v. Garrett*, 165 Wn.2d 152, 196 P.3d 681 (2008), and *State v. Lanciloti*, 165 Wn.2d 661, 201 P.3d 323 (2009). *City of Bothell v. Barnhart*, 172 Wn.2d at 230-231. The court held that article 1, section 22 of the Washington State Constitution means what it says, and provides only that an individual is required to have a jury drawn from the county in which the crime was committed. "Because RCW 2.36.050 provides that courts of limited jurisdiction may select jurors from the area served by the court, it is unconstitutional to the extent that multicounty cities such as Bothell

apply it to select jurors from counties other than there the crime is alleged to have been committed." *Id.* at 233. In our case, the jury was drawn from the county in which the crime was committed.

In *State v. Thyman*, 143 Wn.2d 115, 17 P.3d 1184 (2001), three defendants where convicted of criminal offenses in the Shoreline Division of the King County District Court. Prior to trial, Thyman moved to have the jury panel drawn from King County as a whole. The defendants argued that article 1, § 22 of the Washington Constitution required the jury pools be selected from King County as a whole. The trial courts denied the motions. The juries were drawn from pools selected from an area consisting of three King County zip codes, generally coextensive with the Shoreline Division's electoral district. In applying the directory language of RCW 2.36.050, the pools excluded some district residents, and included some Seattle residents from outside the district's population.

In these consolidated cases, Division One "found that a statute allowing courts of limited jurisdiction to select jury panels from the population served by the court was reconcilable with the constitutional mandate, and was not materially departed from even where jurors originated from outside the Shoreline Division's boundaries." *State v. Thyman*, 143 Wn.2d at 119. "[F]or administrative purposes, the King County District Court has been reorganized into a single unit consisting of geographic divisions

rather than autonomous districts." *Id.* at 120. RCW 3.38.070 provides the statutory basis for dividing a county into Divisions. As noted by our Supreme Court, which quoted the Court of Appeal Division One, "it defies reason to assume that the Legislature would allow the geographic narrowing of jury panel selection and then require the pool be taken from the county as a whole." However, this statement must be taken in the context of *State v. Thyman.*

Consistent with the principles of statutory interpretation discussed *supra*, a statute's plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. The ruling in Thyman relates to the division of a county pursuant to Chapter 3.38 RCW, and the application of the directory language of RCW 2.36.050. Chapter 3.38 RCW is not applicable in our case. In our case, the jury was selected from the county as a whole, consistent with the defendants argument in Thyman. The ruling in Thyman does not interpret the word "may" in RCW 2.36.050, as a statutory mandate. Consistent with the statutory directive, jurors for a jury panel may be selected at random from the population of the area served by the court.

In this case, the City of Camas used the master jury list developed by the Clark County Superior Court to select a jury pool. The jury pool was

selected at random. The master jury list includes Camas Citizens. The jury pool was not limited to just Camas Citizens, rather, it was more expensive and included the entire county as permitted by the statutory scheme, allowing a greater opportunity for a diverse and random jury. The approach to jury pool selection was consistent with the statutory scheme, and was consistent with the article 1, section 22. Therefore, no error occurred.

1(b) The defendant has not demonstrated actual prejudice, and, therefore, is not entitled to relief.

Second, if there is substantial compliance with the statute, then a challenger may claim error only if he or she establishes actual prejudice. *Twyman*, 143 Wash.2d at 122. Assuming *arguendo*, this court finds there has not been strict compliance with the statute in selecting the jury, it may presume prejudice only in a jury tried case if the process constituted a material departure from the statutory formula. *State v. Finlayson*, 69 Wn.2d at 157. The City asserts that it was in substantial compliance with the plain language of the statute and case law, and the defendant provided no showing of actual prejudice. *Supra*. The manner of making up the jury list is merely directory, and need be only substantially complied with, to the end that a fair and impartial trial is held. RCW 2.36.065.

In this case, the defendant had the benefit of a fair and impartial jury.

> "Having determined that a fair and impartial jury was secured in *State v. Phillips*, 65 Wash. 324, 327, 118 Pac. 43

> [(1911)], we held that "...if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial or a venire de novo...in order that he might be again tried by another impartial jury. 1 Thompson, Trials, §120." Where there is substantial compliance with the statute, as there was in the case before us, and the jury selected is fair and impartial, a defendant's right to a fair trial has been protected. *Finlayson*, 69 Wn.2d at 157.

This issue was brought for the first time on appeal. No record was created establishing actual prejudice. There is no indication in the record that there was an exclusion of any class of citizens, or weighting of the jury list, or that the jury list was not a representative cross section of the community. There was no showing the defendant exhausted his peremptory challenges, or that the defendant was denied his right to challenge any juror for bias or cause. The appellate record did not include *voir dire*. No motion or objection was noted prior to trial, or at trial which appears in the record in any way relating to the alleged error. The defendant has not demonstrated material departure from the statute, and has failed to demonstrate actual prejudice. Therefore, no error occurred.

(2) The Defendant Waived His Right to Challenge the Selection of his Jury By Failing to Raise the Issue to the Trial Court:

The city submits that the defendant failed to preserve this issue for appeal. *See State v. Tharp,* 42 Wn.2d 494, 501, 256 P.2d 482 (1953)(selection of the jury is procedural and error regarding same not timely raised to trial court bars its consideration on appeal); *State v. Millan,* 151 Wash.App. 492,

212 P.3d 603 (2009), *review granted,* 168 Wash.2d 1005, 226 P.3d 781 (2010); and CrRLJ 6.1.3(d); ER 103(d); RAP 2.5(a). The court need not consider the merits of the defendant's argument. A party waives any alleged error in the method of making the jury list when the issue is not raised at trial. *State v. Finlayson*, 69 Wn.2d 155, 157, 417 P.2d 624 (1966); also *see State v. McCormack*, 28 Wn.App. 65, 67 n.2, 622 P.2d 1276 (1980)(noting the waiver issue), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362, 83 S.Ct. 448 (1963)(post-trial objection to selection of grand and petit juries was waived in a case in which petitioners knew of selection methods before the trial but did not object).

As a general rule, courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). "As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be 'manifest'--i.e., it must be 'truly of constitutional magnitude'." *State v. McFarland,* 127 Wn.2d at 333 (quoting *State v. Scott*, 110 Wash.2d 682, 686-87, 757 P.2d 492 (1988)). To raise a constitutional error for the first time on appeal, "[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights." *State v.*

McFarland, 127 Wn.2d at 333; RAP 2.5(a)(3). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). It is not enough that the defendant alleges prejudice, actual prejudice must appear in the record. *State v. McFarland*, 127 Wn.2d at 334.

It is a fundamental principle of appellate litigation that a party may not assert on appeal a claim that was not first raised at trial. *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953). This rule is grounded in notions of fundamental fairness and judicial economy. See 2A Karl B. Tegland, Washington Practice: Rules Practice RAP 2.5(1), at 192 (6th ed. 2004); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). A trial court should be given the opportunity to respond to and correct mistakes at the time they are made to avoid unnecessary retrials and appeals.

In the context of this case, Washington State Constitution article I, § 22, requires that "[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The City complied with article I, § 22 in this case by providing the defendant with a trial by an impartial jury composed of residents of Clark County, Washington. The federal constitution

requires that juries be drawn from "the state and district wherein the crime shall have been committed." U.S. Const. Amend. VI. Federal courts interpret "district" to mean the federal district of the crime. *United States v. Contreras-Ceballos*, 999 F.2d 432, 434 (9th Cir. 1993). However, the Sixth Amendment to the United States Constitution does not include the explicit requirement that jurors be drawn from the county where the crime was committed. Case law addressing jury challenges under the federal constitution are not applicable. *See City of Bothell v. Barnhart*, 172 Wn.2d at 231, n.2. The City submits that the defendant has not demonstrated that said error was even constitutional in nature.

Further, even assuming *arguendo* that said error is constitutional in nature, it can be reviewed for the first time on appeal only if it is "manifest," meaning it "had practical and identifiable consequences in the trial of the case" and can survive harmless error review. *State v. O'Hara*, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009). In other words, the defendant, who did not object at trial, must show actual prejudice resulting from the error. *Id.* Where the defendant fails to preserve a constitutional issue by objecting, the burden shifts under the clear parameters of RAP 2.5, and the defendant must affirmatively show prejudice. *O'Hara*, 167 Wn.2d at 98-100.

Based on the record in this case, the defendant cannot show prejudice. The statement of facts set forth above are provided to demonstrate that the

jury fully and fairly considered the facts presented at trial, and convicted the defendant beyond a reasonable doubt. Sufficient evidence existed to support the jury's conviction for DUI. Further, the issue does not survive harmless error analysis. The purpose of Article I, §22 of the Washington State Constitution is to guarantee a fair and random selection of jurors from the county in which the crime is alleged to have been committed.

In the case at bar, the jury was randomly selected from the master jury list, and there has been no showing or record established that a fair and impartial jury was not selected. No record was created establishing actual prejudice. There is no indication in the record that there was an exclusion of any class of citizens, or weighting of the jury list, or that the jury list was not a representative cross section of the community. There was no showing the defendant exhausted his peremptory challenges, or that the defendant was denied his right to challenge any juror for bias or cause. The appellate record did not include *voir dire*.

A random jury from the county in which the crime was committed was impaneled. As addressed by both the Superior Court, and discussed by Court of Appeals Court Commissioner Bearse, the jury selected met the requirements of article I, § 22 of the Washington Constitution. "Moreover, the county administrator randomly selected the jury, which further supports that the jury was selected without constitutional violation." See Page 8 of the

"Ruling Granting Motion for Discretionary Review in Part and Denying Motion in Part."

Unlike *City of Tukwila v. Garrett*, 165 Wn.2d 152, 196 P.3d 681 (2008), *State v. Twyman*, 143 Wn.2d 115, 17 P.3d 1184 (2001), and *City of Bothell v. Barnhart*, 172 Wn.2d 223, 257 P.3d 648 (2011), this issue was neither properly raised, nor even brought to the trial court's attention. The defendant made no objection to the composition of the jury to the trial court. The defendant did not file a motion to limit or change venue, or to limit the jury panel to residents of the City of Camas. No mention of any issue relating to jury selection, or the make up of the jury panel was made to the trial court. The defendant had various opportunities to challenge the composition of the jury but failed to do so. No argument relating to ineffective assistance of counsel was raised on appeal. Failure to raise the issue of ineffective assistance of counsel, amounts to its waiver.

The City objected to supplementing the record. Pursuant to RALJ 6.1(a), except as agreed, "the record of the proceedings in the court of limited jurisdiction for appeal shall include the original or a copy of the log prepared for the recording, the originals or copies of the docket, pleadings, exhibits, orders, and other papers filed with the clerk of the court of limited jurisdiction. Pursuant to 6.3.1, a transcript of the electronic record will also be provided to the court. Because the declaration was not part of the trial record,

the court should not consider them. *State v. Armstead,* 13 Wn.App. 59, 66, 533 P.2d 147 (1975). Regardless, the record still does not show actual prejudice.

As an example, in the context of change of venue, *State v. Hoffman*, 804 P.2d 577, 116 Wn.2d 51 (Wash. 1991), held that change of venue should be granted when necessary to effectuate a defendant's due process guaranty of a fair and impartial trial, but a defendant must show a probability of unfairness or prejudice from pretrial publicity. *State v. Rupe*, 108 Wash.2d 734, 750, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061, 100 L.Ed.2d 934, reh'g denied, 487 U.S. 1263, 109 S.Ct. 25, 101 L.Ed.2d 976 (1988). The decision to grant or deny a motion for change of venue is within the trial court's discretion and appellate courts are reluctant to disturb such a ruling absent a showing of abuse of discretion. *State v. Rupe*, 101 Wash.2d 664, 674, 683 P.2d 571 (1984). As an example, in the context the *Arizona v. Gant,* while there is no question that search and seizure issues are constitutional in nature, even when there is a high probability that a motion to suppress might have succeeded, the absence of a motion to suppress fails to produce an error eligible for review by appellate courts. *See Millan,* 151 Wash.App. at 500.

The jury panel argument was not made to the trial court, and a record was not established suggesting a manifest error affecting a constitutional right to a fair and random selection of jurors, therefore, this argument was waived.

The defendant was afforded an opportunity at trial to raise issues relating to the jury selection and the jury panel, but failure to raise such issues to the trial court amounts to a waiver of said issue. Therefore, no error occurred.

D. CONCLUSION

The defendant's appeal should be denied and the conviction affirmed. The trial court should be affirmed in all respects.

Respectfully submitted this 16 day of July, 2012,

By: _____
David H. Schultz, WSBA 33796,
Assistant City Attorney

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CITY OF CAMAS,	)	
	)	
Respondent,	)	NO. 44184-5-II
	)	
vs.	)	AFFIDAVIT OF
	)	MAILING
VLADIMAR V. GRUNTKOVSKIY,	)	
	)	
Appellant.	)	

STATE OF WASHINGTON)
) ss.
COUNTY OF CLARK)

DAVID H. SCHULTZ, on oath says:

1. That I am the attorney for the respondent, the City of Camas, in the above-entitled appeal.

2. On July 16, 2013, I directed a true and correct electronic copy of the City of Camas's Respondent's Brief, together with this Affidavit, to the Court of Appeals Division II, and Roger Bennett, Attorney for Petitioner.

3. On July 16, 2013, I mailed a copy of the Respondent's Brief, together with this Affidavit of Mailing, by depositing with the U.S. Post Office, Camas, Washington, a postage pre-paid envelope to the following individual:

Roger Bennett, Attorney at Law
12316 Sliderberg Road
Brush Prairie, WA 98606

David H. Schultz, Assistant City Attorney

SUBSCRIBED AND SWORN to before me this 16th day of July, 2013.

Notary Public in and for the State of Washington, residing at Camas.
My commission expires: 9-30-2015

GAIL C GATES
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
SEPTEMBER 30, 2015